

1 Joseph R. Dunn (SBN 238069)
jrdunn@mintz.com
2 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO P.C.
3580 Carmel Mountain Road, Suite 300
3 San Diego, CA 92130
Telephone: 858-314-1500
4 Facsimile: 858-314-1501

5 Attorneys for Defendants
6 GREG GLASSMAN, RUSSELL BERGER,
7 RUSS GREENE, and CROSSFIT, INC.

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

10 NATIONAL STRENGTH AND
11 CONDITIONING ASSOCIATION,

12 Plaintiff,

13 vs.

14 GREG GLASSMAN; RUSSEL BERGER;
15 RUSS GREENE; CROSSFIT, INC., a Delaware
Corporation; and DOES 1 through 20, inclusive,

16 Defendants.

Case No.: 37-2016-00014339-CU-DF-CTL

**NOTICE OF ORDER NO. 6 RULING
RE: DISCOVERABILITY OF IDENTITY
OF PEER REVIEWERS**

[IMAGED FILE]

Dept: C-73
The Honorable Joel R. Wohlfeil

Complaint Filed: May 2, 2016

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD;

PLEASE TAKE NOTICE that on November 15, 2017, the Honorable William McCurine, Jr. (Ret.), duly-appointed Discovery Referee, issued an Order No. 6 Ruling Re: Discoverability of Identity of Peer Reviewers ("Order") in the above-captioned case. A true and correct copy of the Order is attached hereto as **EXHIBIT A**.

Dated: December 5, 2017

Respectfully submitted,
MINTZ LEVIN COHN FERRIS GLOVSKY AND
POPEO P.C.



By: Joseph R. Dunn
Attorneys for Defendants
GREG GLASSMAN, RUSSELL BERGER,
RUSS GREENE and CROSSFIT, INC.

Exhibit A

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

NATIONAL STRENGTH AND
CONDITIONING ASSOCIATION,

Plaintiff,

v.

GREG GLASSMAN; RUSSEL BERGER;
RUSS GREENE; CROSSFIT, INC., a
Delaware Corporation; and DOES 1 through
20, inclusive,

Defendants.

Case No.: 37-2016-00014339-CU-DF-CTL

**ORDER NO. 6
RULING RE: DISCOVERABILITY OF
IDENTITY OF PEER REVIEWERS**

Dept.: C-73
Hon. Joel R. Wohlfeil
Complaint Filed: May 2, 2016

A live hearing in this matter was held on Wednesday, November 15, 2017, at 1:30 p.m. before the Honorable William McCurine, Jr. (Ret.), duly-appointed Discovery Referee, concerning, among other things, the discoverability of the identity of Peer Reviewers. Kenneth Kawabata, Esq. of Manning & Kass, Ellrod, Ramirez, Trester LLP appeared for Plaintiff. Justin S. Nahama, Esq. and Wynter L. Deagle, Esq. of Troutman Sanders LLP and Joseph R. Dunn, Esq. of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. appeared for Defendants. After hearing argument from counsel for the parties, and good cause appearing therefor, the Discovery Referee hereby rules as follows:

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CHRONOLOGY

A review of part of the procedural posture of this issue is important:

1. **July 15, 2015:** The Honorable Karen S. Crawford issues a Ruling Re: Compensation and Disclosure of Reviewers' Identities.
2. **May 2, 2016:** NSCA files the instant action in state court, alleging trade libel, defamation, and unfair business practices.
3. **May 25, 2017:** The Honorable Janis L. Sammartino issues a sanctions order against NSCA.

ANALYSIS

In the instant action, CrossFit again seeks discovery of the identity of the peer reviewers in the Devor Study. The NSCA opposes such discovery arguing privilege and that Judge Crawford has already ruled that the identities of the peer reviewers are not discoverable. The NSCA also argues it has already provided some information about the *peer review process* which is all the discovery to which CrossFit is entitled on the subject. Judge Crawford and the parties rely heavily on *Solarex Corp. v. Arco Solar*, 121 F.R.D. 163, 168 (E.D.N.Y. 1988).

A. General Rule Re: Discovery.

California Code of Civil Procedure Section 2017.010 sets the standard for discovery:

Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property.

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1 **B. No Privilege.**

2 There is no applicable, established, peer review privilege. Nor has there been found a
3 compelling justification to create a new privilege under Rule 501 of the Federal Rules of Evidence.
4 “Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by
5 interpreting ‘common law principles...in light of reason and experience.’” (*Jaffee v. Redmond*, 116
6 S.Ct. 1923, 1927 (1996).) However, in an academic tenure peer review case the Supreme Court
7 stated, “[w]e do not create and apply an evidentiary privilege unless it ‘promotes sufficiently
8 important interests to outweigh the need for probative evidence’” (*University of Pennsylvania v.*
9 *EEOC*, 110 S.Ct. 577, 582 (1990). The Court then concluded, “[w]ith this in mind, we cannot
10 accept the University’s invitation to create a new privilege against the disclosure of peer review
11 materials” (*Id.*). See also *Solarex Corp. v. Arco Solar*, 121 F.R.D. 163, 168 (E.D.N.Y. 1988)
12 (“Thus, absent a ‘compelling justification for a new privilege,’ [citation omitted], weighty judicial
13 authority counsels against the creation of a rule that will presumptively impinge upon the truth
14 finding process.”). *Affirmed* 870 F.2d 642(1989).

15 **C. Factors and Circumstances to Consider in Balancing.**

16 Absent both an established privilege and a compelling justification to create one the standard
17 for addressing discoverability must involve the balancing of interests – for and against discovery.
18 Succinctly stated, the balance is between relevance and necessity demonstrated by the party seeking
19 discovery, versus undue harm and/or burden demonstrated by the person opposing that discovery.

20 The parties rely on *Solarex*, a federal case dealing with federal law. However, both federal
21 and state law focus on the issue of *relevance* which, in turn, is determined in light of the pleadings.
22 See Rule 26(b)(1) of the Federal Rules of Civil Procedure [herein below]. See also *Sanchez v.*
23 *Matta, et al*, 229 F.R.D. 649, 654 (D.N.M. 2004) (“The federal courts have held that the scope of
24 discovery should be broadly and liberally construed to achieve full disclosure of all potentially
25 relevant information.”); *University of Pennsylvania, supra*, 110 S.Ct. at 582 (“Testimonial
26 exclusionary rules and privileges contravene the fundamental principle that ‘the public...has a right
27 to every man’s evidence.”). Rule 26 (c)(1) provides, in pertinent part, “[t]he court may, for good

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1 cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or
2 undue burden or expense, including one or more of the following: (A) forbidding the disclosure or
3 discovery....” *Solarex, supra*, states that “the Federal Rules of Civil Procedure provide a
4 framework for balancing, in the pre-trial discovery context, a litigant’s need for disclosure against a
5 societal interest in confidentiality asserted by one opposing such disclosure” (at 168-169). *Solarex*
6 then cites that portion of the former Rule 26(c) that is similar to Rule 26(c)(1) cited above, and
7 concludes that “[u]nder the Rule, a court is required to compare the potential hardship to the party
8 against whom discovery is sought, if discovery is granted, with that to the party seeking discovery if
9 it is denied. The court in *Solarex* was influenced by several factors. *First*, the court needs to weigh
10 societal interest and private interest. “Any finding that information is protected from discovery
11 must reflect a balancing between on the one hand, the parties’ right to discovery, which stems from
12 society’s interest in a full and fair adjudication of the issues involved in the litigation and, on the
13 other hand, the existence of a societal interest in protecting the confidentiality of certain disclosures
14 made within the context of certain relationships of acknowledged social value” (*Solarex, supra*, at
15 169). The court in *Solarex* considered several factors. The *Solarex* court further explained: “In
16 balancing conflicting interests, courts are admonished not only to consider the nature and magnitude
17 of the competing hardships, but also to ‘give more weight to interests that have a distinctively social
18 value than to purely private interests.” (*Solarex*, at 169.) *Second*, non-party status should be
19 considered. “When deciding discovery disputes, concern for the burden upon non-parties carries
20 ‘special weight”” (*Rocky Mountain Medical Management v. LHP Hospital Group*, 2013 WL
21 6446704, *5 (D. Idaho 2013). “[C]ourts have considered the fact that discovery is being sought
22 *from a third or non-party*, which weighs against permitting discovery” (*Tucker v. American*
23 *International Group*, 281 F.R.D. 85, 91 (D. Conn. 2012) (emphasis original). *Third*, how necessary
24 is the information. “In measuring a party’s need for evidence [sought in discovery], courts look to a
25 variety of factors, including the need to prepare an adequate defense or establish a claim, the
26 availability of alternative evidence, the need to cross-examine expert witnesses, and the need for
27 underlying data” (*In re Fosamax Products Liability Litigation*, 2009 WL 2395899, *3 (S.D.N.Y.

1 2009).) *Fourth*, there should be a credible claim of fraud.

2 Judge Crawford's ruling was correct in the context of the federal pleadings and the state of
3 the pleadings at the time of her ruling. However, a different result is obtained in the state court
4 action based on the pleadings and the current procedural posture.

5 *First*, in her ruling Judge Crawford states:

6 *At this time*, plaintiff is not entitled to an order compelling defendant to disclose
7 the identities of the peer reviewers or to disclose documents or information that
8 would make the identities of the peer reviewers obvious. However, plaintiff is not
9 precluded from making further inquiries about the peer reviewers for the Devor
10 study and/or the integrity of the peer review process. In addition, this order is
11 without prejudice to plaintiff seeking to compel disclosure of the identities of the
12 peer reviewers in the future if it can establish the relevance of this information to
its false advertising and or unfair business competition causes of action in the
complaint or to an affirmative defense in the defendant's answer and establish a
genuine need to obtain evidence directly from the Peer reviewers that it cannot
obtain by other means. [Ruling, pg 20, ll. 15-24.] [Emphasis added.]

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14 Judge Crawford recognized the possibility that CrossFit might later be "entitled to an order
15 compelling defendant to disclose the identities of the peer reviewers." At the time of Judge
16 Crawford's ruling, Judge Sammartino had not issued her sanctions order and NSCA had not filed
17 the subject complaint. Both those events have now transpired. In her sanctions order, Judge
18 Sammartino has already determined as established, *inter alia*, as follows: (1) "the NSCA made the
19 false statement in the Devor study with the intention of disparaging CrossFit and thereby driving
20 consumers to the NSCA"; (2) "the NSCA was aware of the misleading nature of the Erratum"; (3)
21 "the NSCA's false statement in the Devor study were disseminated sufficiently to the purchasing
22 public to constitute advertising or promotion"; (4) "the NSCA was aware that the false statements in
23 the Devor study was being circulated to the media."¹ Judge Sammartino's ruling, at the very least,
24 makes NSCA's alleged fraud relevant to this case and pertinent to CrossFit's Answer and
25 Affirmative Defenses. In the instant action the NSCA has sued Crossit for trade libel, defamation

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27 ¹ Judge Sammartino's sanctions ruling, pgs. 11-14.

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1 and unfair business practices all surrounding the NSCA's role in the content, publication and
2 dissemination of the Devor article. *See for example*, ¶¶ 11, 13, 14a, 15, 16, 20, 21, 25, 27, 28, 32,
3 33 and 34. By its pleadings, the NSCA has injected into this action the very integrity of the peer
4 review process. In the federal action, the NSCA used the peer review process as a shield. Now, in
5 the state court action it seeks to use the peer review process as a sword.

6 *Second*, in the present action, the NSCA has *implicitly* raised the issue of fraud by CrossFit
7 and CrossFit has *expressly* raised the issue of fraud by the NSCA in its answer and affirmative. The
8 relevant facts of the peer review case in question are akin to facts in an academic tenure peer review
9 case where, instead of a "credible claim of fraud", prohibited employment discrimination is
10 charged. In *University of Pennsylvania v. EEOC, supra*, the Supreme Court noted that, "when a
11 court is asked to enforce [an EEOC] subpoena, its responsibility is to 'satisfy itself that the charge is
12 valid and that the material requested is relevant to the charge....' It is not then to determine
13 'whether the charge of discrimination is 'well founded' or 'verifiable'" (110 S.Ct. at 191). See also
14 *McLane v. EEOC*, 137 S.Ct. 1159, 1165 (2017) ("A district court is not to use an enforcement
15 proceeding as an opportunity to test the strength of the underlying complaint. Rather, a district court
16 should 'satisfy itself that the charge is valid and that the material requested is 'relevant' to the
17 charge"). In the present case the fact that the claim of fraud is "credible" is sufficient for balancing
18 regarding the discovery issue.

19 *Third*, in seeking to balance the societal and private interests involved here, the Court
20 concludes that disclosure of the identity of the peer reviewers is necessary. In the federal action,
21 NSCA used to peer review process as a shield. Now, CrossFit convincingly argues, in the state
22 court action it seeks to use the peer review process as a sword. There is now credible evidence of
23 fraud in the peer review process. The NSCA is correct to argue that confidentiality of the names of
24 the peer-reviewed is important to the integrity of the scientific review process. However, it is
25 equally true that the lack of transparency regarding the identity of peer reviewers or the peer review
26 process can undermine scientific knowledge, integrity, and trustworthiness. When there is evidence
27 of fraud, the goal of scientific integrity is achieved through transparency, not through an

1 impenetrable wall always shielding the identities of peer reviewers. Accountability in the peer
2 review process is as important to the integrity of that process as accountability is in social ethics.
3 To the extent that there is an impenetrable wall shielding the peer review process, there is no
4 accountability. Without the constraint of accountability the peer review process can be corrupted
5 and undermine the very scientific ideals the process espouses. The gravamen of both the NSCA's
6 complaint and CrossFit's affirmative defenses focus on whether there was a conscious and
7 deliberate dissemination of knowingly false-injury data in the Devor study that has the appearance,
8 but not the reality, of scientific objectivity, integrity, and reliability. CrossFit has produced credible
9 evidence that the NSCA wrongly influenced the Devor study in a way that compromised the
10 integrity of the peer review process. CrossFit further argues that the Devor study gives the
11 appearance of being scientific but is clearly not scientific; rather it was entirely anecdotal. The lack
12 of scientific rigor by the peer reviewers could cause society to question whether there was collusion
13 or other corruption of the scientific process.

14 The credible evidence that the identities of the peer reviewers is relevant and discoverable *in*
15 *this specific case* includes the following:

- 16 1. The Journal of Strength and Conditioning Research ("JSCR") is a respected
17 scientific journal on which the sports industry relies.
- 18 2. Dr. Kraemer has admitted in deposition that the peer review process is designed to
19 "support the public interest in reliable science [and] enhance the quality of scientific
20 publishing." *NSCA's opposition*, pg. 2. He has also admitted that the peer review
21 process is designed to "enhance the scientific credibility of studies published in the
22 JSCR." *Id.* However, it appears that the critical information in the Devor study was
23 based on information, data, and process that the NSCA knew was unscientific, false
24 and unreliable.
- 25 3. Dr. Kraemer was the Editor-in-Chief and his wife was the Managing Editor.
- 26 4. The Devor Article was submitted to JSCR by Michael Smith, a graduate student,
27 who worked for Dr. Steven Devor at Ohio State University. NSCA and JSCR did

1 not participate in the underlying study. Dr. Devor went to a CrossFit facility in
2 Columbus, OH. His study evolved into a paper about exercise physiology. Dr.
3 Devor submitted a proposal to the JSCR to publish the article and Dr. Kraemer made
4 the decision to publish the article. That original submission did not have injury data
5 and the article was provisionally rejected on that basis. Dr. Devor amended the
6 article to include the false injury data. CrossFit argues that Dr. Kraemer manipulated
7 events in order to have the false injury data included.

8 5. Although the NSCA and JSCR did not author the report, CrossFit Dr. Kraemer, as
9 the Editor-in-Chief purposely manipulated events to produce a false and
10 scientifically invalid report injurious to CrossFit and helpful to NSCA.

11 6. CrossFit produced credible evidence that Dr. Kraemer steered the authors of the
12 Devor study to discuss injuries among CrossFit members. Prof. Devor's first article
13 had no injury data at all. The insertion of injury data came after Dr. Kraemer
14 indicated that such inclusion would make the article publishable.

15 7. After the article was published, one Russell Berger had a telephone conversation
16 with Dr. Kraemer regarding the Devor study. Berger said he was highly suspicious
17 of the reliability and data identified in the study, that to him the data was
18 "questionable". Mr. Berger had in fact contacted six of the participants in the Devor
19 study who apparently believed the data was questionable if not fully fabricated.
20 Berger said it was difficult to believe that 16% of the test subjects dropped out
21 because of CrossFit methods. Dr. Kraemer said he was not surprised by the 16%
22 figure: "So he said he was unsurprised by the results. He said that because it had
23 been peer-reviewed 'That was good enough'. And that's another direct quote, 'good
24 enough'. He had no concerns about it as far as he was concerned because it had been
25 peer-reviewed." *Berger deposition, pgs. 232-233.*

26 8. According to Keith Cinea, NSCA's Person Most Qualified ("PMQ")² Dr. Kraemer

27 ² Person Most Knowledgeable aka Person Most Qualified shall hereinafter be referred to as "PMQ".

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is the only person at NSCA who can order a retraction or erratum. He also testified that Dr. Kraemer is the person who oversees the integrity of the process. *Deposition of Keith Cinea, pg. 16.*

9. When made aware of the clear falsity of the Devor study, Dr. Kraemer failed to take reasonable steps to correct the error and to disseminate the correction. Instead he hid behind the peer review process.

10. Keith Cinea also testified that:

- a. The 16% figure of those who dropped out of CrossFit because of injury or overuse was false. *Cinea deposition, pgs. 47-48.*
- b. NSCA believes it had no duty to investigate whether there was Institutional Review Board approval in this case. *Id, at pg. 73.*
- c. He never notified Ohio State University that the injury data was false and does not have an explanation as to why he failed to notify the university. *Id. at pg. 74.*

11. Dr. Kraemer participated in the final selection of the peer reviewers.

12. The peer reviewers did not test the underlying data in the Devor article to determine how the authors obtained the information.

13. The Devor study is constantly cited in professional journals in a way that is harmful to CrossFit and helpful to the NSCA.

14. As early as Dr. Kraemer had been participating in an anti-CrossFit crusade, viewing CrossFit as one of its primary competitors in the fitness industry.

Given all the above, CrossFit is entitled to discover the identity of the peer reviewers in this instance under an appropriate protective order. The information is clearly relevant; the information goes to the heart of NSCA's complaint and CrossFit's answer and affirmative defenses. It is the NSCA that introduced these issues by its complaint and in producing this information under a

1 protective order³. As CrossFit has effectively argued: the NSCA cannot use the peer review process
2 as a shield and then as a sword. Furthermore, society's right to have a fair and unbiased peer review
3 process outweighs the need to protect the identity of the peer reviewers in this instance. Finally,
4 this information is critical to CrossFit's defense against the complaint.

5 **SUMMARY**

6 The NSCA must forthwith disclose the identity and contact information of the peer
7 reviewers of the Devor study.

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10 Dated: December 5, 2017

William McCurine, Jr.

11 Hon. William McCurine, Ret.
12 Discovery Referee

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³ The information is to be produced under the protective order but not under any designation such as "for attorney's eyes only".

PROOF OF SERVICE

National Strength & Conditioning Association vs. Greg Glassman, et al.
Case No.: 37-2016-00014339-CU-DF-CTL

I, the undersigned, an employee of Judicate West, located at 1851 E. First Street, Suite 1600, Santa Ana, CA 92705 declare under penalty of perjury that I am over the age of eighteen (18) and not a party to this matter or proceeding.

On December 5, 2017, I served the foregoing documents, described as:

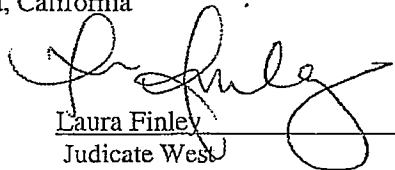
ORDER NO. 6 RULING RE: DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS

to the following parties:

SEE ATTACHED MAILING LIST

- BY E-MAIL** I caused the above-referenced document to be transmitted via electronic mail (e-mail) to the parties as listed on this Proof of Service
- BY ELECTRONIC FILING** I caused such document to be sent via electronic service by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.
- BY FACSIMILE** I caused the above-referenced document to be transmitted via facsimile to the parties as listed on this Proof of Service. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error.
- BY PERSONAL SERVICE** I personally delivered the documents to the persons at the address (es); by leaving the documents at the person (s) office, in an envelope or package clearly labeled to identify the person(s) being served, with a receptionist or an individual in charge of the office.
- BY UNITED STATES PARCEL SERVICE** I am readily familiar with the business' practice for collection and processing of correspondence and mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit with postage thereon fully prepaid at Santa Ana, California in the ordinary course of business
- STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **December 5, 2017**, at Santa Ana, California


Laura Finley
Judicate West



Results Beyond DisputeSM

Santa Ana Office
1851 East First Street
Suite 1600
Santa Ana, CA 92705
Phone: (714) 834-1340
Fax: (714) 834-1344

www.judicatewest.com

Case Contact List

as of Tuesday, December 05, 2017

JW Case #: A233444

Case Caption: National Strength & Conditioning Association vs. Greg Glassman, et al.

Kenneth S. Kawabata, Esq.
Manning & Kass, Ellrod, Ramirez, Trester, LLP
550 West "C" Street
Suite 1900
San Diego, CA 92101
Phone: (619) 515-0269 Fax: (619) 515-0268
Email: ksk@manningllp.com
Representing National Strength & Conditioning Association

Joseph R. Dunn, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
3580 Carmel Mountain Road
Suite 300
San Diego, CA 92130
Phone: (858) 314-1500 Fax: (858) 314-1501
Email: jrdunn@mintz.com
Representing Greg Glassman; Russell Berger; CrossFit, Inc.; Russ Greene

Justin S. Nahama, Esq.
Troutman Sanders, LLP
11682 El Camino Real
Suite 400
San Diego, CA 92130
Phone: (858) 509-6000 Fax: (619) 231-8796
Email: justin.nahama@troutman.com
Representing Greg Glassman; Russell Berger; CrossFit, Inc.; Russ Greene

Wynter L. Deagle, Esq.
Troutman Sanders, LLP
11682 El Camino Real
Suite 400
San Diego, CA 92130
Phone: (858) 509-6000 Fax: (619) 231-8796
Email: wynter.deagle@troutman.com
Representing Greg Glassman; Russell Berger; CrossFit, Inc.; Russ Greene

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PROOF OF SERVICE

I am employed in the County of San Diego; my business address is Mintz Levin Cohn Ferris Glovsky and Popeo PC, 3580 Carmel Mountain Road, Suite 300, San Diego, CA 92130. I am over the age of 18 and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for personal delivery, for mailing with United States Postal Service, for facsimile, and for overnight delivery by Federal Express, Express Mail, or other overnight service.

On December 5, 2017, I caused a copy of the following document:

NOTICE OF ORDER NO. 6 RULING RE: DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS

to be served on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, and addressed as follows:

Jeffrey M. Lenkov
MANNING & KASS, ELLROD, RAMIREZ,
TRESTER LLP
801 S. Figueroa Street, 15th Floor
Los Angeles, CA 90017

Attorneys for Plaintiff
Telephone: (213) 624-6900
Facsimile: (213) 624-6999
jml@manningllp.com

Kenneth S. Kawabata
MANNING & KASS, ELLROD, RAMIREZ,
TRESTER LLP
550 West C Street, Suite 1900
San Diego, CA 92101

Attorneys for Plaintiff
Telephone: (619) 515-0269
Facsimile: (619) 515-0268
ksk@manningllp.com

Hon. William McCurine, Jr. (Ret.)
Judicate West
402 W. Broadway, Suite 2400
San Diego, CA 92101

Discovery Referee
(619) 814-1966

Justin S. Nahama
Wynter L. Deagle
Troutman Sanders
11682 El Camino Real, Suite 400
San Diego, CA 92130

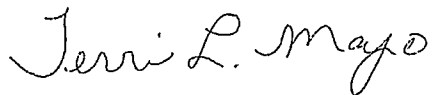
Counsel for Defendants
Telephone: 858 235-4040
Justin.nahama@troutman.com
Wynter.deagle@troutman.com

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- MAIL:** Such correspondence was deposited, postage fully paid, with the United States Postal Service on the same day in the ordinary course of business.
- PERSONAL:** Such document was delivered by hand to the offices of the addressee.
- FEDERAL EXPRESS:** Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by Federal Express, the United States Postal Service or an authorized courier or a driver authorized by that courier to receive documents for overnight delivery.
- ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 4, above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ELECTRONIC TRANSMISSION:** By submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 5, 2017, at San Diego, California.



Terri L. Mayo